No. 20280

In the

United States Court of Appeals

For the Ninth Circuit

R. B. RANDS, et ux,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF PENDLETON GRAIN GROWERS, INC., Amicus Curiae

On Appeal from the United States District Court
for the District of Oregon

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I.

BACKGROUND—EFFECT ON COMMERCIAL ENTERPRISES ON COLUMBIA RIVER

The filing of this brief Amicus Curiae in behalf of Pendleton Grain Growers, Inc., was authorized by Order of this Court, dated September 27, 1965.

The ruling of Honorable John F. Kilkenny, Judge of the United States District Court for the District of Oregon, in advance of trial, that the value of lands as a port site was not a compensable interest, vitally effects Pendleton Grain Growers, Inc., whose grain elevator, lo-

cated on the banks of the Columbia River at Umatilla, Oregon, has been taken by the government by power of eminent domain. This grain facility is now the subject of a proceeding in the United States District Court for the District of Oregon entitled United States of America vs. Pendleton Grain Growers, Inc., No. 65-303.

The elevator, which is pictured in this brief, is a transshipment point between rail and water and truck and water, moving an annual harvest of almost four million bushels of grain downstream by barge to lower river ports on the Columbia River. This grain is funnelled through the Umatilla Elevator from the rich and fertile wheat fields of Eastern Oregon, and Eastern Washington. The total grain storage capacity of this elevator is 335,000 bushels, although outside storage slabs handle additional grain during rush seasons. Obviously the grain is not held at this location, but merely transshipped to river transportation from truck and rail, which haul from the farms and highway elevators located inland from the river. This elevator has complete barge loading facilities and a dock extending into the Columbia River and provides a maximum loading capacity to barges of 65,000 bushels per eight hour shift.

In view of Judge Kilkenny's ruling in this case, it is probable that Pendleton Grain Growers, Inc., will be prohibited from showing to a jury any evidence of valuation of its land on the Columbia River for a port site,

although it has operated this enterprise as a port site, and utilized the waters of the Columbia River to ship its grain since 1938.

We earnestly believe that the ruling of the Court below in determining that the constitutional requirement of full market value for the highest and best use of the property condemned may be diminished by the navigation power of the United States in this case and in other cases now pending in the District of Oregon is an unusual application of the rule and should not be asserted as applicable to riparian owners on the Columbia River at the few available port sites.

In the interests of brevity we shall address ourselves to cases applicable to the issue of admissible evidence to show value for purposes of condemnation of fast lands, in particular for port site development along the Columbia River behind the John Day dam. We wholeheartedly support the other points argued by the Appellants and feel they have been soundly argued and further reference to those questions would be superflous.

II.

ARGUMENT

The Government Must Compensate the Owner of Property for Port Site Value of Fast Lands if Such is the Highest and Best Use to be Made of such Lands.

Unquestionably the rule persists that the government must pay the owner of fast lands under condemnation, market value evidenced by its highest and best use. *United States ex rel, T.V.A. v. Powelson*, 319 U.S. 266, 275 (1943) Highest and best use is influenced by the natural resources which either join or are near the property taken. Query: If the highest and best use of property is for port site purposes can evidence of such a fact be admitted? It is the contention of the Appellants that this question must be answered affirmatively. The government contends that the Supreme Court has established the law contrary to Appellants' position and that it does not have to compensate Appellants for their riparian rights in the land taken.

Riparian property rights are:

"* * * (1) Use of water for general purposes, as bathing, domestic use, etc.

(2) To wharf out to navigability.

(3) Access to navigable waters * * *"

Hilt v. Weber, 233 N.W. 159, 168 (Mich. 1930)

In this case we are concerned with the riparian right of access to navigable waters.

The government relies on Supreme Court dicta in *United States v. Virginia E. & P. Co.*, 365 U.S. 624, 629

(1961) referring to the denial of compensation for riparian property rights in language following:

> "Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss . . (citing cases) . . *it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.*" (Emphasis added)

That portion of the above quotation which is not emphasized is well documented with authorities, while the concluding and emphasized phrase is not supported by authorities and is not necessary to the decision of the Court. That the statement is dicta is shown by the defining of the main issue as follows:

> "* * * The basic issue is thus whether the respondent's easement might be found to have value other than in connection with the flow of the stream * * *" Id. at 629-630.

Furthermore, it is important to note that the Court did not overrule any prior authorities contradictory to the emphasized statement. See, *United States v. Kansas City Life Ins. Co.*, 339 U.S. 779 (1950) To date the Supreme Court has gone no further than to hold that a riparian landowner does not have a compensable right

in the flow of a navigable stream. *United States v. Twin City Power Co.*, 350 U.S. 222, 225-226 (1956).

We submit that it is not necessary to riparian usage to rely upon flow of a stream and specifically it is not necessary to the use of land for a port site to be concerned with whether or not the water upon which the fast land abuts is in fact "flowing." The power dam cases in which no compensation is allowed to the owner of fast lands above high water level, *Olson v. United States*, 292 U.S. 246 (1933); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. Chandler-Dunbar W.P. Co.*, 229 U.S. 51 (1913); *United States v. Virginia E. & P. Co., supra*, obviously involve "flowing" streams.

Although the government need not compensate a riparian owner for benefits attributable to the flow of the stream, such holdings do not conflict with Appellants' position that compensation should be paid for their port site. Appellants' position is supported by the following statement:

> "The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was

an immediate probability. This land was the only land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such purpose." *United States v. Chandler-Dunbar W.P. Co.*, 229 U.S. 51, 76-77 (1913).

It is impossible to distinguish availability for lock and canal purposes for which compensation was required in *Chandler-Dunbar*, from availability for a port site as urged in the case at bar.

To deny compensation for location of Appellants' land on the Columbia River and its availability and adaptability as a port site is to conclude that the location of land is not to be considered as a factor in arriving at value. It has long been the established law in cases not dealing directly with fast lands that location of the property is proper evidence to be admitted on valuation of land. *United States v. 5 Acres of Land, More or Less, Situate in Town of Babylon, Suffolk County, N.Y.*, 50 F. Supp. 69 (E.D.N.Y., 1943); *Thatcher v. Tennessee Gas Transmission Co.*, 84 F. Supp. 344 affd. 180 F2d 644 (5th Cir. 1950); *United States v. 585.87 Acres of Land, More or Less, Osage County, Kansas*, 210 F. Supp. 585 (D. Ka., 1962); *Gwathmey v. United States*, 215 F2d 148 (5th

Cir. 1954). In addition the Supreme Court has indicated that location of lands may under some circumstances give them special value. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). The contention that the proximity of Appellants' lands to the river is improper proof of value is unsupported by the authorities.

For the court to deny such evidence is really to deny any evidence of the commercial value of land along the Columbia River although the commercial purpose is not related to the flow of the river and involves only access to the river. The unfairness of such a holding is emphasized by the location of the Pendleton Grain Growers' Umatilla elevator on the Columbia River as exhibited herein.

As has been cogently argued in Appellants' brief, even as against the government, the owner of fast lands has access to the river. (App. Br., pg. 27-33) This right of access is a valuable property right entitled to compensation. *United States v. Kansas City Life Insurance Co., supra; United States v. 2477.79 Acres of Land*, 259 F2d 23 (5th Cir. 1958); *United States v. River Rouge Imp. Co.*, 269 U.S. 411 (1926).

III.

CONCLUSION

We have presented in this brief, hoping that it will be of assistance to the Court, some additional reasons

for admission of evidence of the value of port sites to the owners of fast lands along a navigable stream. The effect of the denial of such evidence on commercial enterprises along the Columbia River is obvious. We trust that the Court will not regard our selection of this narrow discussion as an indication that the other points argued by Appellants are not equally sound; to the contrary, we believe them to be so adequately covered in the brief of Appellants as to require no further argument by us.

On the basis of the foregoing arguments, together with the arguments advanced in Appellants' brief, the judgment should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with the applicable parts of said rules.

Of Attorneys for Pendleton Grain Growers, Inc.

APPENDIX

Pendleton Grain Growers, Inc., elevator,
Umatilla, Oregon